

This document is published at:

Pérez del Prado, D. (2018). A European unemployment benefit scheme: looking for real alternatives . *Cross Border Benefits Alliance-Europe Review*, July 2018, pp. 33-55

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# CBBA–EUROPE

# REVIEW

CROSS BORDER BENEFITS ALLIANCE – EUROPE REVIEW

July 2018

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## A EUROPEAN UNEMPLOYMENT BENEFIT SCHEME: LOOKING FOR REAL ALTERNATIVES\*

Dr. Daniel Pérez del Prado<sup>92</sup>

### Keywords

unemployment, unemployment benefits, EU, EUBS.

### Abstract

The first Great Recession of the 21st century, from 2007 to 2013, which saw the collapse of the most important economies in the world, had significant consequences, including high unemployment rates. In the case of the EU and the Eurozone, some particular difficulties had to be overcome, which made the crisis even deeper. The

so-called “Eurozone crisis” arrived when several countries assumed private debts from their bailed-out banks. Hence, it started the second part of the depression characterized by the difficulties of these states to repay or refinance their own sovereign debt. The special state of development of the Eurozone contributed in reinforcing the crisis, because some structures had not been worked out and the traditional national tools linked to the monetary policy were no longer available.

In this context, the proposal of the European Unemployment Benefit Scheme (EUBS) was raised. On the one hand, it would act as an automatic stabilizer, that is, giving the Eurozone those kinds of macroeconomic policies to fight against the effects of crisis whose lack reinforced it. On the other hand, it would allow a human face of the European economic governance to be shown, revitalising the social spirit of the European project.

This article analyses the general framework of this proposal from an interdisciplinary

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\*This paper is inspired in Dullien, S. and Pérez del Prado, D., “How to stabilize the euro area economy without creating political discord: a compromise proposal for a European Unemployment Insurance Scheme”, FES, Madrid, 2018. [http://www.fesmarid.org/media/2017\\_FESpublicaciones/Arbeitslosenversicherung\\_doc.pdf](http://www.fesmarid.org/media/2017_FESpublicaciones/Arbeitslosenversicherung_doc.pdf). It is also part of the National Research Project “Un derecho del trabajo para la recuperación: competitividad empresarial y cohesión social” (DER2015-64676-C2-2-P).

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perspective, highlighting his pros and cons and the different varieties which have been introduced. Additionally, it provides the details of one recent alternative that tries to overcome the legal (and political) difficulties to implement this translational scheme.

### 1. The European Unemployment Benefit Scheme proposal after the Great Recession

The first Great Depression of the 21st century, from 2007 to 2013, which saw the collapse of the most important economies in the world, had significant consequences, including high unemployment rates. In the case of the EU and the Eurozone, some particular difficulties had to be overcome, which made the crisis even deeper. The so-called “Eurozone crisis” arrived when several countries assumed private debts from their bailed-out banks. Hence, it started the second part of the depression characterized by the difficulties of these states to repay or refinance their own sovereign debt. The special state of development of the Eurozone contributed in reinforcing the crisis, because some structures had not been worked out and the traditional national tools linked to the monetary policy were

no longer available.

This produced a new phase within the recession, in which the so-called austerity measures played a central role. Without other alternatives and in exchange for financial help, these European countries were forced to reduce their budget deficits severely. The final result was more crisis, higher unemployment and an increasing anti-Europe feeling all over Europe. For example, in the case of Spain, according to Eurostat, the percentage of people declaring their support for the EU decreased from 60% in 2007 to 20% in 2012. For Germany, the support went down from 47% to 30% in the same period.

In this context, the proposal of the European Unemployment Benefit Scheme (EUBS) was raised. On the one hand, it would act as an automatic stabilizer, that is, giving the Eurozone those kinds of macroeconomic policies to fight against the effects of crisis whose lack reinforced it. On the other hand, it would allow a human face of the European economic governance to be shown, revitalising the social spirit of the European project.

In fact, the EUBS proposal has been at the heart of political debate in recent years. In particular, the serious problems suffered by

the countries of the Eurozone have resulted in a profound reform of the European economic governance. Nevertheless, the failures have been so important that some voices claim of going toward a greater fiscal integration. Hence, the so-called “Five President Report” (and, previously, the “Four Presidents Report in 2012) suggested the inclusion of a «mechanism of fiscal stabilisation for the euro area as a whole» (Juncker, J. C. 2015). The European Parliament has been also working in this direction and, specifically, regarding the EUBS as the best option within automatic stabilizers (European Parliament 2012).

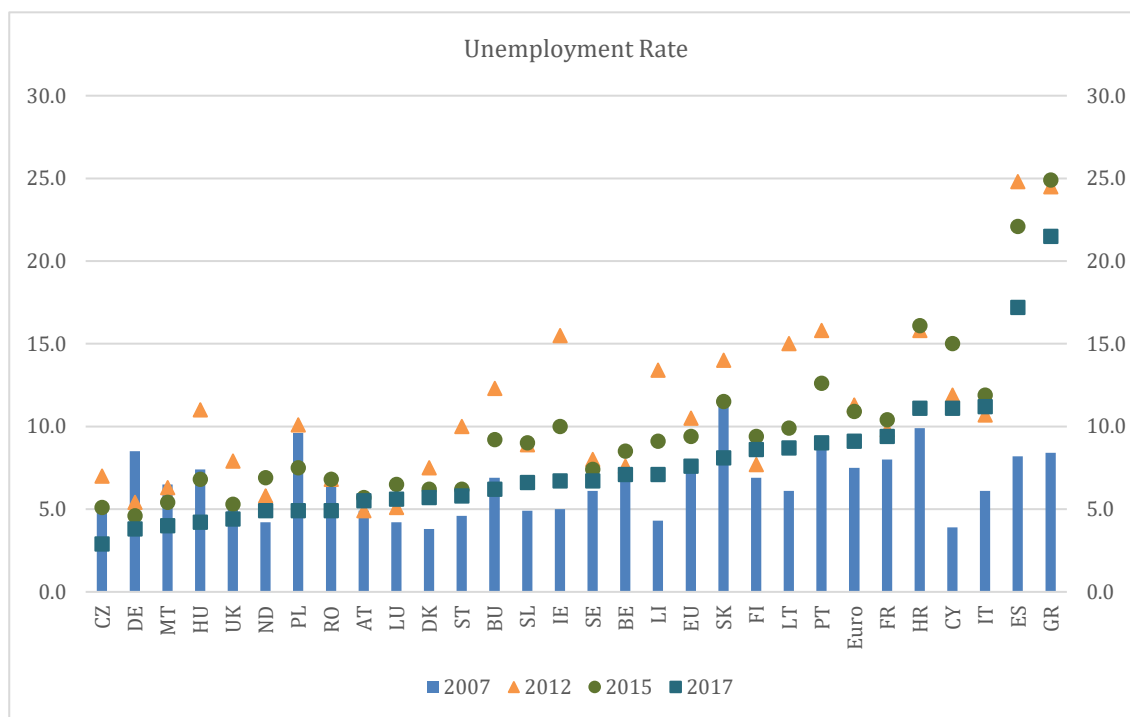
However, these additional ways to strengthen the Economic and Monetary Union (EMU) and, consequently the European project as a whole, have not succeeded so far. Great disparities among Member States prevent the necessary consensus to implement such an important measure being reached. In other words, national priorities seem to be in conflict.

The first disparity refers to, obviously, the unemployment rate. From a dynamic point of view, whereas some countries, those with the lowest unemployment rates, have seen the number of unemployed people change scarcely (in the case of Germany,

its unemployment rate was lower in 2012 - 5.4%- than in 2007 -8.4%); other have showed a tremendous volatility. In the case of Greece and Spain, the unemployment rates rocketed from around 8% (in the European average) up to 24 % in 2012<sup>93</sup>. This is also the case of other countries in the south of Europe such as Cyprus, Croatia and Italy. From a static perspective, the differences between countries are huge. Spain and Greece, even with improvements, closed 2017 with unemployment rates that were more than double the level of Member States with the lowest rate (Czech Republic, Malta and Germany). The following graph shows this evolution for all Member States, the EU and the Eurozone.

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<sup>93</sup> The maximum was at 27.5% for Greece and 26.1% for Spain in 2013.

**GRAPH 1**

GRAPH 1 Source: own elaboration based on Eurostat.

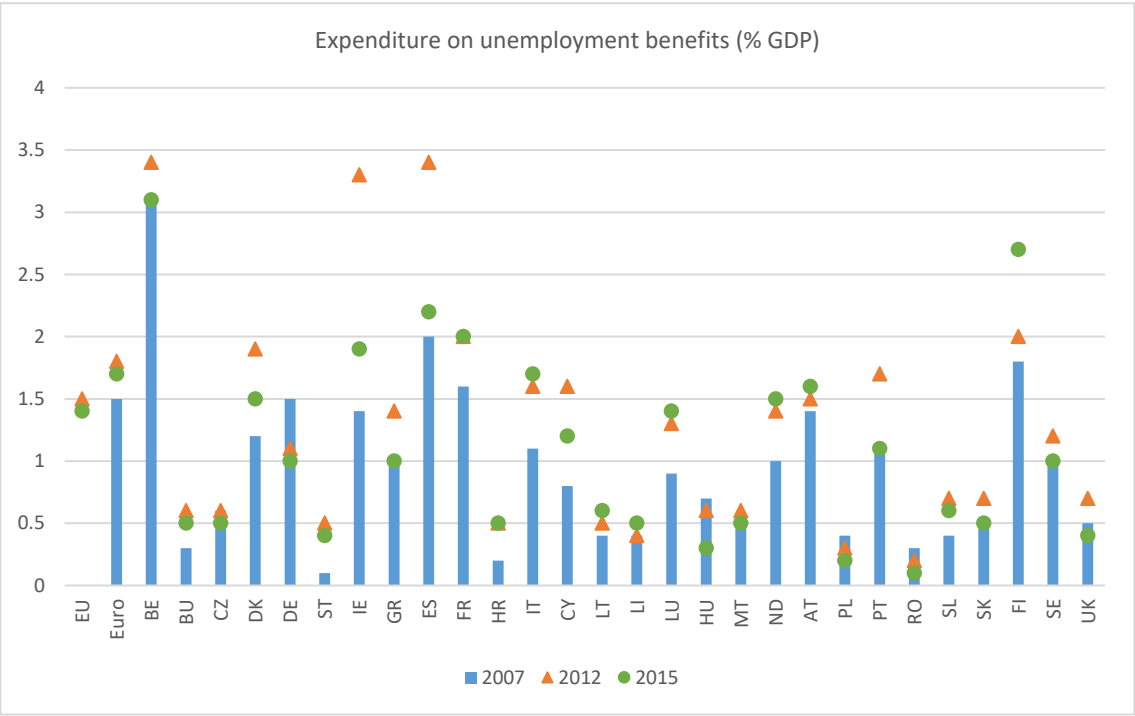
The second divergence is related to expenditure on unemployment benefits. Logically, the differences in unemployment are translated to the public expenditure which supports national unemployment benefits. In the case of Spain, one of the countries which suffered the crisis the most, this variable increased from 2% of GDP up to 3% between 2007 and 2012. Then it was reduced to 2.4% at the end of 2016. This evolution is especially important if it is considered that, despite the generosity of the Spanish unemployment system which may

be classified as “medium” compared to other European countries, it generated surpluses until 2008 (Pérez del Prado, D. 2014). Consequently, a system which is quite equilibrated was under a “double contradictory pressure” because, on the one hand, more sources were necessary in order to cover the increasing number of unemployed people but, on the other hand, reducing public expenditure was imposed to achieve the deficit objectives for each year. The final result is that the coverage rate was reduced from more than 80% to

55%. This was owing to both the incapacity of the system to keep the level of protection in the context of an over-long recession and the cuts implemented by the Gov-

ernment. The evolution of the rest of Member States, the EU and the Eurozone is shown in the following graph.

**GRAPH 2**



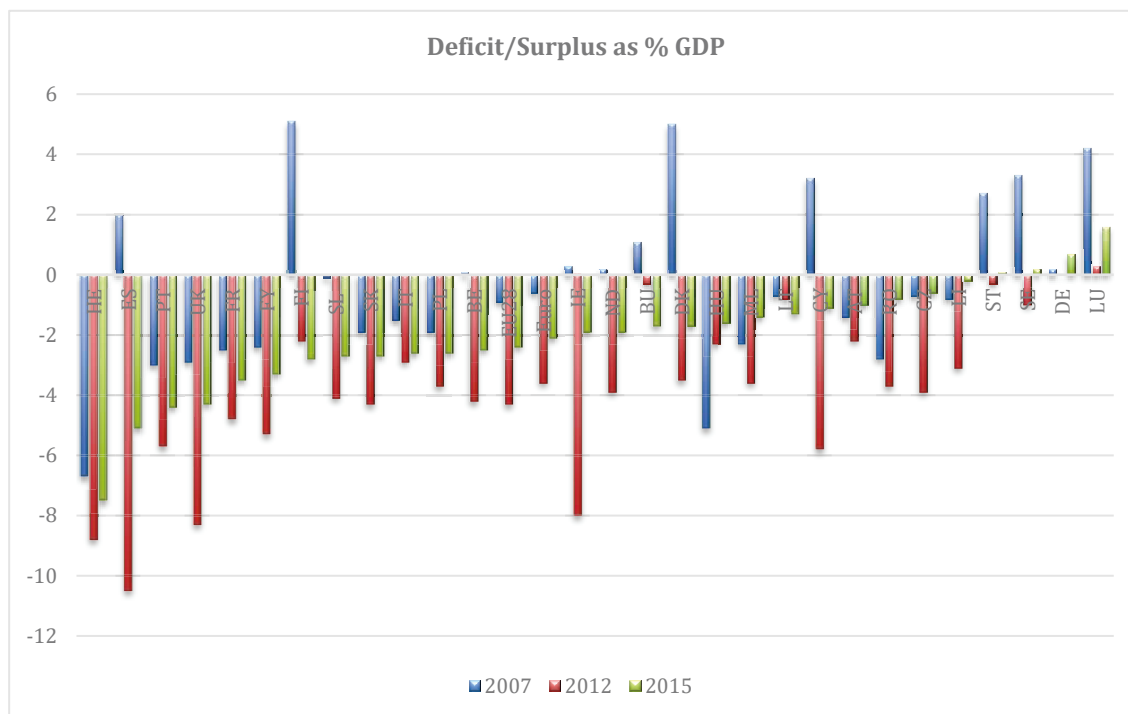
GRAPH 2 Source: own elaboration based on Eurostat. Data for Croatia 2007 is 2008. Data for EU, Euro and Poland 2015 is 2014.

Finally and quite related to the previous one, the differences in the general government deficit or surplus are also important across the European Union. The following graph shows the evolution for 2007, 2012 and 2015. In the case of Spain, the situation changed from a surplus of 2% GDP in

2007 to a deficit of 10.5% in 2012. On the other hand, Luxemburg and Germany maintained surpluses during the full recession period.



GRAPH 3



GRAPH 3 Source: own elaboration based on Eurostat.

These and other divergences may explain some of the difficulties in attempting to achieve the objective of implementing the European Unemployment Benefit Scheme (EUBS) proposal, that is, a common unemployment benefit for European countries. Despite some of the aims related to the economic governance being common, the

national priorities vary because the situation in each country is very different. Nevertheless, the inclusion of this scheme would be able to produce some important economic benefits for all economies in the EU. This point will be analysed in the following section.

## 2. Discussing different alternatives from an economic and legal point of view

### 2.1. The economic perspective: pros and cons

The special difficulties suffered by Eurozone countries during the recession forced them to take some important measures and discuss alternatives to prevent a repeat in the future. Within these proposals, there is a rather extended consensus among economists about the beneficial effects of introducing automatic stabilizers in the Eurozone (since (Marjolin et al. 1975), (MacDougall 1977), (Padoa-Schioppa & Communities 1987), (Emerson 1992) to, more recently, (Allard et al. 2013), (Alcidi, Giovannini, & Piedrafita 2014), (De Grauwe & Yuemei 2016), among others).

Despite there exist large variety of options (regional policies, public investment, Eurobonds, special funds or progressive taxation), a common unemployment benefit scheme has been considered by different authors the most attractive alternative. There are a number of important reasons: a) it represents a type of expenditure that is anti-cyclical; b) it acts automatically in the event of recession; c) it has a high multiplier effect; d) it is a mechanism which acts

very quickly; and e) it provides income support to those individuals in society who bear a large part of the social costs.

However, this debate appears and disappears in waves, according to the social and political situation during and after an economic crisis (this was the case in the 70-80's, 90's and nowadays). Consequently, from a political perspective it would be necessary to keep the discussion as a structural part of the economic construction of the EU and Eurozone and/or using the current situation in different European countries as argument.

The different proposals regarding the European Unemployment Benefit Scheme (EUBS) may be analysed as follows:

On the one hand, it is possible to find two approaches regarding the mechanism itself. Some authors propose an “individual” or “direct” EUBS (also called “genuine”), that is, the classical unemployment benefits covering unemployed individuals directly by the European level. Others prefer the option of a “State” or “indirect” EUBS (also named “equivalent”), in other words, a scheme consisting in supporting the States' systems and, consequently, providing protection to individuals indirectly.

On the other hand, the debate also con-

cerns a number of economic technical issues such as financing and cost, prevention from moral hazard, countries involved or stabilization impact. These are present in all proposals without considering the type. Nevertheless, these studies rarely comprehend other kinds of additional technical analysis, such as the legal viability of the hypothetical implementation of each alternative.

This aim does not aim to analyse the details of all these versions, but the advantages and disadvantages of each one must be highlighted in order to focus the main points of the debate. Consequently, some elements of the different versions and proposals will be lost in exchange of a clearer explanation.

Concerning both types of EUBS, on the one hand, the indirect version requires the least grade of intervention or harmonization so, *a priori*, it would be the easiest form of implementation from a legal point of view. However, it also means some disadvantages such as “free riding” (del Monte, M. & Zandstra, T. 2014), that is, countries would be incentivized to increase the generosity of their unemployment benefit system considering it is covered by the Union. On the other hand, the direct version

means a higher grade of integration, which is both an advantage and a disadvantage. The first because it strengthens the effects attributed to a supranational coordinated system and the European project itself; the latter, because the legal (and political) difficulties also rise. These does not only comprehend the modification of the treaties, the creation of new regulation and new sources of finance, but also the reform of national rules in order to coordinate them with the European system and both of them with active employment policies.

Regarding technical issues, financing is probably the most controversial one. Here, it is possible to find three different types of mechanisms. Firstly, the creation of new taxes or contributions, such as a payroll tax (Dullien 2012) (Dullien 2013) or a corporate tax (Pisani-Ferry, Vihriälä, & Wolff 2013). These alternatives have the advantage of being an exclusive source of the system and its close relation with it and the beneficiaries. Additionally, in the first case, it tries to replicate the national system at European level. On the other hand, the main disadvantage concerns the increase of labour or corporate tax and its effects on labour and capital factors. Second, it is also possible to finance EUBS by specific

contributions to a fund or budget, as percentage of GDP, fixed or variable (Beblavý, Gros, y Maselli 2015) (Dolls et al. 2015). This alternative avoids the problem of taxing productive factors, but it is not directly linked to the system and its beneficiaries. Finally, financing EUBS by debt and, particularly, by the so-called “Eurobonds” have been also on the table (Beblavý, M. & Lenaerts, K. 2017). However, this is probably the most controversial option and it attracted strong opposition from those who do not accept the mutualisation of the debt in the Eurozone.

## 2.2. The legal approach: looking for viable alternatives

### 2.2.1. *The legal base of the EUBS proposal: a first approach*

From a legal perspective, transforming these proposals into a viable project means the consideration of many legal problems, some of them closely related to the political ones. Following the same methodology, only the most common and practical ones will be analysed. Hence, the first point is trying to fit the proposals in the European legal system, taking into consideration the different ways offered by the European Law.

The first one is the Treaty, which considers

social policy (social security) as a shared competence (article 4 TFEU), but in which States keep a strong intervention (Pérez Domínguez 2017). Accordingly, the first step in order to implement a EUBS proposal is to determine if the Treaty offers a legal base which is enough to set this mechanism. If the proposal remains within the limits of the Treaty, that is, the competence of the EU, it would be possible to develop it through the legal mechanisms explained below. On the contrary, if the project goes further than these limits, reform of the Treaty (primary legislation) would be needed, which means some additional political difficulties. Actually, this is the case of the projects which propose to substitute national systems with a European one because article 153 TFEU sets the EU’s role as supporting and complementing the activities of Member States in the field of social security and social protection. Nevertheless, considering the grade of intervention in the Treaty, the requirements may differ.

Concretely, two procedures are set. The “ordinary revision procedure” concerns key amendments (such as increasing or reducing the competences of the EU) and it requires a rather complex procedure includ-

ing the creation of a Convention, a Conference of representatives of the governments of EU countries and, finally and frequently, the call for a referendum if it is required by national constitutions. The “simplified revision procedure” refers to internal policies and actions (for example, agriculture and fisheries, internal market, border controls, economic and monetary policy) and aims to facilitate further European integration and avoids the need to celebrate the Convention and the Conference. However, unanimity in the Council is required and the competences of the EU may not be extended by means of this procedure.

Within the limits of the Treaty reforms, when national competences are involved or there are serious doubts about it, some “innovative” and intermediate tools have been used recently, as in the case of the so-called “European Stability Mechanism” (ESM). In order to implement it more easily, avoiding the ordinary procedure, a minor reform of the Treaties (by simplified procedure) was applied (concretely, on the article 136 TFEU), whereas an international treaty among Member States created an intergovernmental organization, which operates under public international law, to provide access to financial assistance pro-

grammes for member states of the Eurozone in financial difficulty. In other words, it meant the creation of a new tool outside the EU legal system but connected to it. Despite it being a rather controversial tool (Craig, P. 2013), it has been declared fully legal by the CJEU (C-370/12, *Pringle Case*). This “third way” may be also taken into consideration, but keeping in mind the limits set in *Pringle*.

Secondly, within the framework of the Treaties, it would be possible to use other institutions already created within the EU legal system, which is the easiest way because it means the reform of secondary legislation. The Treaty provides two options (Miranda Boto 2011): a) harmonization that, according to article 4 TFEU, would require the inclusion of the issue (as it is the case) in the Treaty; b) another possibility coordination (article 5 TFEU). Both mechanisms have a different scope.

Whereas harmonization supposes the most intense way of approximation of national legislations, setting some minimum standards or common rules; coordination implies a lower level of incidence, because it aims to achieve some general common objectives, implying minor changes on national regulations (Herrero Suárez y Peñas Mo-

yano 2013). Considering the magnitude of some proposals, the latter does not seem strong enough to implement them. However, this does not mean that coordination is not useful as a necessary complement of the EUBS project.

Concretely, the grade of development of the current Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems is still so far from its maximum possibilities. For example, an unemployed person who satisfies the conditions of the legislation of the competent Member State for entitlement to benefits and who goes to another Member State in order to seek work, there shall retain his entitlement to unemployment benefits for a period of three months up to six months only, depending on the circumstances. In the same sense, the use of social security contributions in another country different to which they were generated is also limited by the fact of contributing and losing an employment in the latter. These and other limits are explained, among others, by the mistrust of the monitor mechanisms of other Member States and the desire of controlling and limiting the unemployment benefits expenditure

and its effects from a geographical point of view. Nevertheless, this produces a negative effect on job mobility, and most importantly for the EUBS project, it strongly limits unemployment benefit schemes integration, which helps in the creation of higher levels of protection.

On the other hand, regarding harmonization, its potential depends on the kind of EUBS proposal. Obviously, those focused on the creation of an autonomous European system fall outside the limits of this legal mechanism, whereas others which aim to complement a national system may be included under its coverage because it would be supporting national programs in setting some minimum thresholds.

However, some important limits concern this way. These depend on the kind of proposal, even though some of them must be highlighted. Firstly, according to article 153 (4) TFEU, the provision of the EU adopted in the social security and social protection field «shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof». Second, the tool set to harmonize legislations is the Directive, which is not probably the best solution in order to

achieve the objective of EUBS <sup>(94)</sup>. Nevertheless, it would be adequate to set some minimum and common requirements in to access to financial help (following the American model), which requires its combination with other legislative measures. Anyway, the creation of European institutions on the base of national regulation is not a novelty, as the case of European work council shows. Finally, the use of this legal way also requires the especial legislative procedure and, consequently, the Council shall act unanimously, after consulting the European Parliament and Economic and Social Committee and the Committee of the Regions.

### *2.2.2. Discussing different alternatives from a legal perspective: pros and cons*

On these basis, the objective of implementing a EUBS requires analysing the different alternatives proposed by the economists (mainly) from the legal alternatives perspective.

Concerning the two main models, on the one hand, , despite genuine EUBS seems to have a greater stabilization impact and

means the most developed model from the European integration point of view, it would face some important legal obstacles. The most important one would be the reform of the Treaty by the ordinary procedure, what requires national acceptances and, consequently, in some cases, its approval by referendum. Therefore, any proposal which comprehends the modification of the current *status* of competences, implies the right of Member States to define the fundamental principles of their social security systems, or significantly affects the financial equilibrium thereof will be covered to this procedure. Despite the issue being really attractive for most citizens, showing the social face of Europe after a hard and long period of crisis, the political environment is not propitious considering the results of referendums in the last decade. Special difficulties arise in the Central and Nordic countries, in which this kind of measures are not really popular (Hacker & Cédric 2017).

Alternatively, the equivalent EUBS seems to be easier compared to the previous one, but technical difficulties are also important. Firstly, it is not clear that the modification of the Treaties may be avoided. In the best situation, the simplified procedure would be

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<sup>94</sup> Other ways, such as the paragraph k), «the modernisation of social protection systems », which requires the ordinary legislative measure, has never been used in the field of unemployment benefits and it contents the specific exception of social security and social protection of workers.

applied, which means unanimity in the Council. Second, in the case of the amendment of the Treaties not being necessary, it is not clear if the classical methods of regulation and, specially, harmonization would be enough to build the EUBS project. Finally, even considering the limits of harmonization, different requirements connected to the legal base chosen to develop the proposal must be also satisfied.

A “third way” (symbolized by example of ESM) would also be possible, with or without the modification of the Treaties, by sending the regulation to an extra-EU (or extra-EMU) mechanism. However, as the CJEU sets in *Pringle*, this type of alternative may not be used to overpass the Treaties, infringing the EU Law. Consequently, the requirements of the case law must be fulfilled and, finally, the competences cannot be altered.

But the technical difficulties regarding the implementation of each model are also translated to the different varieties of each one. For example, regarding finances, article 311 TFUE sets that the creation of new categories of own resources require a Council’s decision, adopted by the special legislative procedure, unanimously and after consulting the European Parliament.

However, this is not enough, because it adds that the decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. So, again, some national problems may raise. This would be the case of a new system of contributions or payroll taxes, but also any kind of new contributions, as some proposed as percentage of GDP.

Consequently, the easiest way to implement the EUBS would be the equivalent model. Nevertheless, the legal requirements to develop it depend on the type of proposal<sup>95</sup>. The next section will use a recent proposal to exemplify it.

### 3. How to implement the EUBS: a recent proposal

#### 3.1. The proposal: a general description

Recently, (Dullien, S. & Pérez del Prado, D. 2018) have suggested a “compromise proposal” which is focused on avoiding political discord. This is based on an equivalent system financed by payments from countries’ budget. Under such a scheme, each country would pay 0.1 per cent of its

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<sup>95</sup> (Repasi, R. 2017) analyses the legal viability of several options.



GDP each year into a common European unemployment fund. Eighty per cent of its pay-ins would be deposited in a national compartment; whereas the other twenty per cent would be pooled into a “stormy day fund” (a common compartment for very large shocks).

Pay-outs would be made whenever the unemployment rate increased more than 0.2 percentage points above its average rate for the previous five years. Concretely, if unemployment increased by more than 0.2 percentage points, countries could draw money from their national compartments. Nevertheless, whether a country were hit by a very large shock, defined as increases in the unemployment rate of 2 percentage points or more, additional payments would be made from the “stormy day fund”.

Within this framework, each country would be allowed to run a cumulative deficit in its national compartment of up to 5 percent of its GDP. In this first instance, this deficit would be financed by loans from other national compartments. In the event that all funds should be depleted, the scheme would be replenished by borrowing in financial markets. The system would thus be allowed to issue bonds, backed by future contributions as collateral. Finally, in order

to counter the fear of permanent transfers, a dynamic claw-back system would be part of the system.

Regarding its legal implementation, this report also borrows elements from prior studies, trying to adapt them to the particular characteristics of this proposal. Despite legal literature is limited, it shows a clear trend. Whereas initial analysis concluded that EUBS would require the amendment of the Treaties (European Commission 2012) (Fuchs, M. 2013) (Repasi, R. 2013)<sup>96</sup>; nowadays, most papers set the contrary position, that is, it is possible to materialize most of the proposals on the bases of the current EU primary and secondary legislation, without changing the Treaties.

This report is not an exception. Consequently, within the framework of the Treaties, it suggests some alternatives supported by use existing legal mechanisms of the EU Law. In order to clarify the analysis these mechanisms, they are classified considering a) the payment side of the scheme and the conditions linked to it and b) the financing issues.

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<sup>96</sup> In this last case, the author shows some doubts about the possibilities given by Articles 352 and 153(1) TFEU.

### 3.2. Legal alternatives for its practical development

#### 3.2.1. Options for the payment side

Concerning the payment side, there are four main possibilities: the multilateral surveillance procedure (Article 121(6) TFEU), fiscal assistance in case of crisis (Article 122 (2) TFEU), funds concerning social cohesion (Article 175 (3) TFEU) and the so-called “flexibility clause” (Article 352(1) TFEU).

Firstly, multilateral surveillance is a macro-economic stabilization instrument for policy coordination. This coordination requires Member States to follow the recommendations given by Commission’s guidelines (Article 126(2)). Furthermore, Article 121(6) prohibits Union legislator to introduce other sanctions than those foreseen by Article 121(4). This means the whole multilateral surveillance procedure is built on the base of non-binding rules, what makes it an inappropriate instrument to set the EUBS. This conclusion does not change by the fact that Article 136(1) permits to «adopt measures specific to those Member States whose currency is the euro» because its scope is also the multilateral surveillance procedure (Repasi, R. 2017).

Second, the Treaty permits to grant, under

certain conditions, Union financial assistance to the Member States in difficulties or seriously threatened with severe difficulties (Article 122(2)) TFEU. This clear connection to economic and financial problems makes it adequate as legal base for EUBS, especially for the equivalent type. However, it faces two kinds of limitations. On the one hand, it would be appropriate for the most severe situations (Repasi, R. 2017)<sup>97</sup>. On the other hand, it only and would require the parallel adoption of “certain conditions”, what implies that financial assistance can only be granted on a case-by-case basis (Beblavý, M. & Lenaerts, K. 2017) and, therefore, it prevents from applying the mechanism automatically according to a certain trigger, as it is the case<sup>98</sup>.

Third, some authors have proposed that the legal framework of funds devoted to social cohesion (Article 175(3) TFEU) would be another legal base to develop any kind of equivalent EUBS (Ferrante, V.

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<sup>97</sup> This paper sets this legal base would be adequate for an equivalent EUBS with a trigger of >2 of unemployment rate, which would only permit to activate the stormy day fund in our proposal

<sup>98</sup> However, the Council has a wide discretion to define what economic difficulties is and, additionally, it is also possible to think about *ex ante* conditions and not only *ex post*, what would facilitate the application of this Article.

2016) (Ministero dell'Economia e delle Finanze 2016) (Ministero dell'Economia e delle Finanze September 2016a). According to the first paragraph of Article 175 TFEU, the Union shall support the achievement of some objectives, among others social cohesion, by the action it takes through specific Funds. Nevertheless, it will also be possible to adopt «specific actions» outside the Funds if they are necessary and in accordance with the ordinary legislative procedure (paragraph 3). According to these studies, this “specific actions” could include everything needed to implement EUBS. Nevertheless, other authors reject this legal base because the equivalent system focuses on the macroeconomic stabilization effect in times of crisis and, consequently, it would not be a proper mechanism to reduce social and economic disparities related to social cohesion (Repasi, R. 2017)

Finally, the so-called “flexibility clause” seems to be the legal tool which raises wider consensus. According to Article 352(1) TFEU, its application requires to fulfil four conditions. First, the Union action has to be necessary to achieve the «objectives set out in the Treaties». In the case of EUBS, Article 3(3) TEU calls for establish-

ing «a highly competitive social market», aiming at «full employment and social progress» and promoting «social justice and protection», «economic, social and territorial cohesion» and «solidarity among Member States»<sup>99</sup>. Second, this action must be developed «within the framework of the policies defined by the Treaties». In other words, it must be at least a shared competence, what permits Union to act. Furthermore, it is possible to justify that European level is the most appropriate to compensate asymmetric shocks<sup>100</sup>. Third, the Treaties must not provide for the necessary powers. The reference to the «policies defined by the Treaties» has to be understood as the use of this clause is possible if there are no other possibilities in the Treaties. As none of the previous alternatives are a clear legal base, this would be the only solution. Finally, the Court of Justice of European Union established a further limit, which is the prohibition of an im-

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<sup>99</sup> These objectives have to be read, among others, in conjunction with Article 9 TFEU, according to which in «defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health».

<sup>100</sup> This is clearly linked to the principle of subsidiarity (Article 5(3) TEU).

plicit Treaty amendment<sup>101</sup>. This means that the distribution of competences must not be altered, and constitutional saving clause must be respected. In this particular field, the latter requires shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof (Article 153 (4) TFEU)<sup>102</sup>. Concerning this issue, it must be highlighted that that a regulation establishing a EUBS on the basis of Articles 352(1) TFEU always has to be adopted by unanimity in the Council, so Member States may raise their veto to safeguard their constitutional clause.

Nevertheless, Article 352 must not be applied solely because it is subject to the bail-out clause embedded in Article 125 (1) TFEU. Under this clause and according to the interpretation given by *Pringle* case law<sup>103</sup>, the transfer of funding from the EU level to Member States, in case such a transfer is not explicitly foreseen by the Treaties, must be justified by the adoption of any kind of contagion, such as the im-

plementation of structural reforms. Concretely, three kinds of mechanisms have been consider adequate to function as a justification: experience rating, claw-back and minimum requirements with regard to activation policies (Beblavý, M. & Lenaerts, K. 2017) (Repasi, R. 2017).

According to this proposal, the combination of national compartments and a dynamic claw-back system would enough to fulfil the requirements of conditionality set Article 125(1) TFEU. Additionally, other mechanisms would be also compatible, such as the experience rating mechanism or setting minimum requirements related to active employment policies.

### *3.2.2. Options for the financing side*

Regarding financing side, there are two possibilities. On the one hand, EUBS may be financed by the general Union budget. On the other hand, it is also possible to finance it by a dedicated fund outside the Union general budget.

Concerning the specific line within the budget, Article 311 (2) TFEU sets Union budget has two kinds of sources: “own resources” and “other revenues”. Whereas “own sources” are primarily intended to finance the general Union budget, “other revenues” may be used to finance a specif-

<sup>101</sup> CJEU, Opinion 2/94 [1996], ECR I-1759, para. 30.

<sup>102</sup> And this links to the principle of proportionality (Article 5(4) TFEU).

<sup>103</sup> CJEU Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, paras 130-136.

ic purpose. The latter category is chosen because it has two clear advantages: its regulation is more flexible and it may be dedicated to a specific purpose.

On this basis, new contributions should be created and defined by the same legal act that established the legal framework for the payments (and the whole EUBS), which the contributions should finance. In this regard, financial contributions paid by EU Member States, which are additional to the contributions paid by Member States under the Own Resources Decision<sup>104</sup>, must, in principle, follow the rules given by Article 311(3) TFEU. In other words, the especial legislative procedure is required and, consequently, the Council shall act unanimously, after consulting the European Parliament and Economic and Social Committee and the Committee of the Regions and in accordance with their respective constitutional requirements.

Nevertheless, in the existing Union agencies (such as the European Bank Authority), it is possible to find some precedents in which this procedure is avoided by using a different legal base. Consequently, it would

be possible to create these new contributions on the base of the above mentioned Article 352 TFEU, which only requires unanimity in the Council (Repasi, R. 2017).

On the other hand, States' contributions may finance an external fund. In this regard, the European Social Fund may play an important role, because according to article 162 it aims to «improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living». The main problem is that ESF has never been used for passive employment policies, only for active ones. Consequently, its use would require a profound reform, introducing some elements which have been strange to its content so far and, probably, the amendment of the Treaty as well. In any case, this fund would be an effective instrument in order to develop measures on active employment policies to complement the EUBS.

Nevertheless, there are other possibilities whose application seems to be easier. For example, Member States could sign an international treaty to create an intergovernmental organization, which operates under public international law, to provide access to financial assistance within the EUBS framework. This was the case of the so-

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<sup>104</sup> 2014/335/EU, Euratom: Council Decision of 26 May 2014 on the system of own resources of the European Union. OJ L 168, 7.6.2014, p. 105–111

called “European Stability Mechanism” (ESM). Moreover, it would be also possible to create, using Article 352 (2) TFEU as legal base, a Union agency with a legal personality distinct from the Union, whose budget is the fund.

### 3.2.3. *Other alternatives*

Finally, along with all these alternatives and comprehending both payment and financing sides, the report suggests that it would be possible to implement the proposal by either concluding an international agreement amongst a subset of Member States (which is a solution rather similar to one mentioned above but with a broader scope<sup>105</sup>) or by establishing an enhanced cooperation according to Article 20 TFEU. This option would permit to avoid the requirement of unanimity in the Council.

In the first case, the CJEU decided in the mentioned *Pringle* case, that the Member States may conclude this kind of international agreements in areas in which the Union has not already regulated. Additionally, some other conditions must be respected. Accordingly, international agreements must: not modify Primary law; be in compliance with Primary law and Secondary law;

affect exclusive Union competences or shared competences; only be concluded if the Union legislative procedure failed or is likely to fail; must not circumvent Union legislative procedure or the Treaties.

In the second option, the most relevant obstacle is the prohibition under Article 326(2) TFEU to undermine the internal market or economic, social and territorial cohesion. However, some authors have conclude this is not a real barrier considering EUBS would not impede the social cohesion of the Union but only strengthen the one between the participating Member States (Repasi, R. 2017).

## 4. Conclusions

The debate on the creation of a common unemployment benefit scheme for the EU or the Eurozone is circular. During economic crisis it emerges as an intelligent solution to combine social protection and efficient macroeconomic policies. After that, it fades until the following economic collapse. The so-called “Great Recession” has emphasised the necessity of creating macroeconomic stabilizers for the Eurozone, as a part of the plans for achieving a deeper and fairer Economic and Monetary Union.

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<sup>105</sup> Actually, this would be another possibility even for all Member States as the ESM shows.

The EUBS has been in the core of the political debate again.

Economist were the first ones in analysing its viability, assessing the pros and cons of this proposal from both national and European perspective. Now, it is also possible to find deep legal analysis. As it was mentioned before, whereas initial studies concluded that EUBS would require the amendment of the Treaties; nowadays, most papers set the contrary position, that is, it is possible to materialize most of the proposals on the bases of the current EU primary and secondary legislation, without changing the Treaties. These legal alternatives open a new stage in the debate: a decisive leap towards the political arena.

Both the European Commission and the European Parliament have shown their interest in this proposal, promoting these studies and analysis in different levels and context. Some discussions have been also held but without producing any concrete decision. The scientific debate seems to be mature enough to generate a rigorous, concrete and serious political discussion about the potential implementation of the EUBS.

The recovery is a good moment to hold this kind of public debate without any kind of

inherence related to the difficulties of the crisis. Nevertheless, this lack of pressure is usually the cause of its failure. As historical precedents show, economic recoveries also have the risks of underestimating the problems which must be solved, postponing its solution of a further opportunity which never arrives.

But this recovery also shows additional difficulties which prevent from having this inevitable discussion. The emergence of nationalisms and populisms all over Europe (and in other parts of the Globe) makes that adopting significant decisions about European integration, as the EUBS, is something as difficult as the times we are living.

However, each historical context has its own particularities. Other problems concerned Europe in the past, but political determination achieved to overcome them. The current European project is the result of those decisions and its future will depend on the political determination and strong resolve.

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